FORM NLRB-4477
(2-85)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

Overland Park, Kansas

FIRSTLINE TRANSPORTATION SECURITY, INC.

Employer

and

Case 17-RC-12354

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. **1/**

3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: **2/**

All full-time and regular part-time screeners and lead screeners performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, and employed by Firstline Transportation Security, Inc., at the Kansas City International Airport located in Kansas City, Missouri, but excluding all office clerical employees, professional employees, supervisors as defined in the Act, as amended, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE
PROFESSIONALS OF AMERICA (SPFPA)

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc**., 156 NLRB 1236 *(1966)*; **N.L.R.B.** v. **Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge of the Subregion who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 8600 Farley Street - Suite 100, Overland Park, Kansas 66212-4677 on or before **June 3, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **June 10, 2005.**

Dated May 27, 2005

at Overland Park, Kansas

/s/ D. Michael McConnell
Regional Director, Region 17

1/ The Parties stipulated that Firstline Transportation Security, Inc., the Employer, is an Ohio corporation engaged in commerce within the meaning of the Act by providing security services primarily to the aviation industry, through a contract valued in excess of $50 million with the Transportation Security Administration, (TSA). Pursuant to its contract with TSA, the Employer provides security passenger and baggage screening services at the Kansas City International Airport located in Kansas City, Missouri, the only facility involved in this proceeding. During the past year, which the Parties agree is a representative period, the Employer, in the course and conduct of its business operations, purchased and received goods and services valued in excess of $50,000 directly from sources located outside the State of Missouri.

While acknowledging that it meets the Board's statutory and discretionary jurisdictional standards, the Employer asserts that it is not subject to the jurisdiction of the Board. The Employer's argument is twofold. First, the Employer argues that the Aviation and Transportation Security Act. (ATSA), 49 U.S.C. Section 114, statutorily bars the Board from asserting jurisdiction. Second, the Employer argues that even if the ATSA's provisions do not specifically preclude the Board from asserting jurisdiction, the Board should decline to assert jurisdiction in the interest of national security. Contrary to the Employer, the Petitioner claims that the ATSA does not preclude the Board from asserting jurisdiction through either its literal statutory provisions, or its current application to private employees of the Employer.

Based on the entire record, and having thoroughly considered the Parties' briefs, I find that it is appropriate for the Board to assert jurisdiction in these circumstances. The statutory provisions of the ATSA do not preclude the Board's assertion of jurisdiction in this situation, despite some findings by the Federal Labor Relations Authority that Federal employees employed as security screeners are precluded from collective-bargaining. Further, a balancing

of policy considerations favors the assertion of jurisdiction by the Board, particularly where the TSA, as an arm of the Department of Homeland Security, recognizes and assents to a structure in which private employees, while performing services identical to those of public employees, are not precluded from the right to collectively bargain.

On October 1, 2004, I issued a Decision and Order in Cases 17-RC-12297 and 17-RC-12298, which involved this Employer and the same Unit involved herein. I dismissed the petitions in those cases because I found that the security screeners sought by the Petitioners were guards as defined in Section 9(b)(3), and that the Petitioners in those cases had allowed non-guards into their membership. As such, because the Petitioners could not be certified as the representative of a unit of guards, I did not direct an election.

As I noted in my earlier Decision and Order in Cases 17-RC-12297 and 17-RC-12298, in response to the terrorist attack on the United States on September 11, 2001, Congress on November 19, 2001 passed the Aviation and Transportation Security Act (ATSA), Pub. L. 107-71, 115 Stat. 597, 49 U.S.C. Section 114, making airport security a direct Federal responsibility and creating the Transportation Security Administration (TSA) as an entity within the Department of Transportation. Congress provided that the head of the TSA, the Under Secretary of Transportation for Security, would be responsible for the security screening of all passengers and property carried aboard passenger aircraft, and the hiring, training and employment standards of security screening personnel. ATSA Section 101(a), 49 U.S.C. Sections 114(b)(1), 114(e). Congress required the Under Secretary to establish the position of Federal Security Manager at each airport to oversee the screening of passengers and property. ATSA Section 103, 49 U.S.C. Section 44933. The actual work of screening passengers and property was to be done by employees of the Federal

Government except that Congress provided in ATSA Section 110(b), 49 U.S.C. Section 44901(a), that the Under Secretary could contract with a "qualified private screening company" to perform screening operations upon application of an airport operator during a two-year pilot period at no more than five airports, or after three years following enactment of the legislation at any airport, subject to the conditions set forth in ATSA Section 108(a), 49 U.S.C. Sections 44919, 44920.

Kansas City International Airport is one of the five airports chosen for the pilot program allowing the TSA to contract with private companies to perform passenger and baggage screening operations. The other four airports are located in Tupelo, Mississippi; San Francisco, California; Rochester, New York; and Jackson Hole, Wyoming.

The ATSA sets forth employment and training standards for security screeners employed by the Federal Government, and gives the head of TSA the authority to establish programs for the hiring and training of such personnel, as set forth in 49 U.S.C. Section 44935. Among the qualifications required under the statute are United States citizenship; having a satisfactory or better score on the Federal Security Screening Personnel Selection examination; having no impairment due to illegal drugs, sleep deprivation, medication or alcohol; not presenting a national security risk; having a high school diploma or its equivalent; and possessing the requisite mental and physical abilities necessary to screen and read monitors and x-ray machines. Included at Section 44935(i) of the ATSA is a prohibition of the right to strike by individuals employed in screening positions.

The ATSA applies these standards to private contractors hired under the private program. Thus, Section 44919(f) of the ATSA states:

> Qualified Private Screening Company - A private screening company is qualified to provide screening services at an airport participating in the pilot program under this section if the company will only employ individuals to provide such services who meet all the requirements of this chapter applicable to Federal Government personnel who perform screening services at airports under this chapter and will provide compensation and other benefits to such individuals that are not less than the level of compensation and other benefits provided to such Federal Government personnel in accordance with this chapter.

In this regard, Section 44919(h) also states as follows:

> Termination of contracts - The Under Secretary may terminate any contract entered into with a private screening company to provide screening services at an airport under the pilot program if the Under Secretary finds that the company has failed repeatedly to comply with any standard, regulation, directive, order, law, or contract applicable to the hiring or training of personnel to provide such services or to the provision of screening at the airport.

On January 8, 2003, Admiral James Loy, TSA's Under Secretary, issued a memorandum denying collective-bargaining rights and the right to representation for Federal security screeners employed by the TSA. Under Secretary Loy's memorandum stated that an annotation to Section 44935 of the ATSA, allowed such a determination in the interests of national security. The language of the annotation to Section 4493 relied on by Under Secretary Loy to deny Federal security screeners collective-bargaining rights is as follows: "Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of Title 49, United States Code. The Under Secretary shall

establish levels of compensation and other benefits for individuals so employed." Section 111(d) of the ATSA, Public Law No. 107-71, 49 U.S.C. Section 44935 Note (2001).

On November 4, 2003, the Federal Labor Relations Authority (FLRA) upheld Under Secretary Loy's determination that Federal security screeners had no collective-bargaining or representational rights. *Transp. Sec. Admin. and Am. Fed'n of Gov't Employees*, 59 F.L.R.A. 423 (2003). The FLRA dismissed petitions filed by the American Federation of Government Employees, AFL-CIO, which sought to represent the Federal employees employed by the TSA who occupied the positions of passenger screeners, baggage screeners and lead screeners. In making its finding that the ATSA language precluded the assertion of jurisdiction, the FLRA relied exclusively on the language of the annotation to Section 44935 cited above, to conclude that collective-bargaining and union representation was inappropriate, because the Under Secretary had unfettered discretion in making all decisions about the "terms and conditions of employment of Federal service" of security screeners. The FLRA further reasoned that the "notwithstanding any other provision of law" language contained in the same annotation "trumped" any other provision of the ATSA that might purport to give TSA employees collective-bargaining rights. The FLRA concluded that the other provisions of the ATSA that allowed TSA employees the same rights as other Federal employees, such as 49 U.S.C. Sections 114(m) and (n), including the right to collectively bargain, applied only to non-security screener positions employed by the TSA, but because of the more specific language of Section 44935's annotation, security screeners in the "Federal service" were not subject to the collective-bargaining rights afforded other TSA employees.

The Employer asserts that the decision of Under Secretary Loy to deny collective-bargaining and the right to representation for security screeners in "Federal service" applies

equally to the employees of private contractors performing security screening functions pursuant to ATSA Sections 44919 and 44210. I do not agree.

While the FLRA has determined that Federal employees in the position of security screener are exempt from jurisdiction of the Federal Service Labor Management Relations Statute (FSLMRS), the FLRA's finding is not controlling with respect to security screeners of private contractors employed under ATSA Sections 49 U.S.C. 44919 and 44210. Instead, the National Labor Relations Act governs the appropriateness of asserting jurisdiction over these private employees. I find no language in the ATSA that would purport to remove private employees, even those performing security screening duties, from the protections of the NLRA. While the privately employed screeners are subject to the enumerated employment and training requirements set out in ATSA Section 44395(e) through (j), the annotation to Section 44935, which is the sole language relied on by the Under Secretary Loy to deny Federal security screeners collective-bargaining rights and the FLRA to decline jurisdiction to security screeners, limits itself to security screeners in "Federal service." ATSA Section 44901 states that all security screeners will be employees of the Federal Government, but specifically excepts from Federal service those screeners employed by private contractors under ATSA Sections 44919 and 44920. I do not find, as contended by the Employer, that the fact that Sections 44919 and 44920 are mentioned in Section 44901, means that the annotation to Section 44935 which references Section 44901, applies to private security screener employees, as well as Federal Government screeners. Instead, the language of Section 44901 appears to specifically remove privately-employed screeners from the boundaries of Federal Government service, and thereby removes them from the application of the annotation to Section 44935.

Based on current information disseminated by the TSA, it appears that the TSA does not view the ATSA as precluding collective-bargaining rights for privately-employed security screeners. Thus, the TSA's website page dealing with frequently-asked questions about private contracting of security screening functions, the following answer appears, in response to the question of what TSA's policy is regarding private screeners' rights to unionization:

> "A: It is TSA policy to allow federal screeners to join any union but to not allow any union to represent all screeners for the purpose of collective-bargaining. TSA does not take a position regarding whether screeners employed by private screening companies may organize their company. This is a matter between those screeners and their private employer. However, airport security screeners, private or federal, do not have the right to strike."

Additionally, in its June 2004 Guidance on Screening Program Partnership, the TSA states as follows:

> Collective Bargaining
>
> Federal screeners are not entitled to engage in collective bargaining with TSA. TSA is neutral about contract employees of a private firm seeking to organize themselves for collective bargaining with that contractor.
>
> Airport security screeners do not have the right to strike, regardless of whether they are employed by TSA, by a contractor, or by an airport authority under contract to TSA. Congress explicitly recognized that not all airport security screeners will be employed by TSA or another Federal agency, and wrote language in ATSA that prohibits the right to strike, regardless of their employer.
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> Under Section 111 of ATSA, adding provisions to 49 USC 44935, Congress specifically stated that "An individual that screens passengers or property, or both, at an airport under this section may not participate in a strike, or assert the right to strike, against the person (including a governmental entity) employing such individual to perform such screening."

Given that there is no statutory preclusion to the Board asserting jurisdiction, the Board has routinely asserted jurisdiction over private contractors of the Federal government, despite substantial control by the government over the private employees' terms and conditions of employment. In fact, since 1995, the Board's jurisdictional policy for private employers with

close ties to exempt government entities requires only that the Employer meet the definition of "employer" under Section 2(2) of the Act, and that the employer meet the Board's monetary jurisdictional standards. *Management Training Corporation*, 317 NLRB 1355 (1995). The Parties have stipulated to both the definitional and monetary jurisdictional requirements in the instant case. Despite its stipulation that it meets the *Management Training Corporation* requirements, much of the Employer's testimony deals with the degree of control exercised by the Federal Government over the employees of the Employer. The Employer admits that it has and exercises authority over its employees with respect to scheduling, attendance, discipline, and structuring of a wage and benefit package within the range determined by its loaded hourly rate, which is set by TSA. While not denying its Section 2(2) employer status, the Employer asserts that the Federally provided training programs and standard operating procedures, Federal supervisory oversight of screening operations, and staffing and wage determinations, all of which are dictated by TSA, render it little more than a personnel provider. Although the Employer did not specifically raise the issue, the testimony elicited by the Employer appears aimed at asserting that its contract with an exempt governmental entity deprives it of sufficient control over its labor relations to engage in meaningful bargaining. However, as noted, the measure of government control is not the test used by the Board in determining whether the Board should assert jurisdiction. Instead, in deciding whether to assert jurisdiction over private employers who contract with exempt governmental entities, the Board considers ***only*** whether the employer meets the definition of an employer under Section 2(2), and whether the employer meets the monetary standards established by the Board for asserting jurisdiction. Id. at 1358, overruling *Res-Care, Inc.*, 280 NLRB 670 (1986). The Board's reasoning in *Management Training Corporation* was that the *Res-Care* standard required substantial litigation of the levels of ultimate authority over essential terms and conditions of employment, and that the Board

consequently should not "…be deciding as a jurisdictional question which terms and conditions of employment are or are not essential to the bargaining process," and that instead, "… whether there are sufficient employment matters over which unions and employers can bargain is a question better left to the parties at the bargaining table and ultimately to the employee voters in each case." Id. at 1357 and 1355. There is no doubt that the Employer retains sufficient control over the terms and conditions of its employees' work to establish that it is an Employer under Section 2(2) of the Act, which is all that is required under the *Management Training Corporation* standard. As such, because the Employer is an employer under Section 2(2) and meets the Board's applicable monetary standards, it is appropriate to assert jurisdiction over the Employer, despite the fact that the Federal Government retains significant control over many of the terms and conditions of the Employer's employees.

Finally, the Employer asks that I find that even if the language of the ATSA does not specifically preclude assertion of jurisdiction under the NLRA, the interests of national security dictate such a result. In some circumstances, policy considerations do militate in favor of or against the assertion of the Board's discretionary jurisdiction. The goal in the instant case is to balance the Board's interest in effectuating the purposes and policies of the Act, with the Federal Government's interest in protecting national security. While I recognize and have thoroughly considered the concerns expressed by the Employer, I find that assertion of jurisdiction over the Employer is not incompatible with the maintenance of national security requirements. The Federal Government has retained control over the private employees' training and employment standards under ATSA Section 44935. That training and adherence to standards will serve to develop employees who are mindful of their duties in protecting this nation's airports against terrorist threats, and further, will serve to limit the security-sensitive areas that will be subject to collective-bargaining. Additionally, Congress has seen fit to preclude the private security

screeners' right to strike, which further operates to protect the national security interests underlying the ATSA, by protecting the public from work stoppages. Moreover, unlike their private counterparts, the denial of collective-bargaining rights for Federal security screeners was founded in an understanding that Federal screeners would receive the full panoply of Federal wages and benefits regardless of any right to union representation, and a belief that collective-bargaining for these Federal employees would only serve to enhance the security screeners entrenchment in the Federal civil service system, which Congress viewed as an impediment to expeditious and efficient employment decisions in the Federal sector. See, *An Argument for the Denial of Collective-Bargaining Rights of Federal Airport Screeners*, 72 Geo. Wash. L. Rev. 834 (April 2004). However, that scenario is inapposite to the instant situation, because the employees here will not be subject to the Federal civil service system. Finally, where the TSA, which is fully aware of its national security mandate, has made no pronouncements seeking to eliminate private security screeners from the protections of the National Labor Relations Act, and has instead stated that the decision to collectively-bargain is between the screeners and their private employers, I find that it would effectuate the policies of the Act to assert jurisdiction. See *General Electric Co. (Schenectady, N.Y.),* 89 NLRB 726, 736 (1950) in which the Board took official notice of "…the unqualified assent of the Atomic Energy Commission to collective bargaining among the employees involved" [in atomic energy operations]. I make this finding with a full understanding that it is incumbent upon me to accommodate the Act's interests with those of other Federal statutory schemes. See, *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002); *San Manuel Indian Bingo and Casino,* 341 NLRB No. 138, Slip Op. 12 (May 28, 2004).

2/ The Parties stipulated that the unit described above is appropriate. The Parties further stipulated that the Petitioner is a labor organization within the meaning of Section 9(b)(3), and as

such, is qualified to represent guards. For all of the foregoing reasons, I direct an election in the petitioned for Unit to determine whether the employees in the Unit desire to be represented for collective bargaining purposes by the Petitioner.